No. 4445

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTHWEST METALS COMPANY,
A Corporation,
Plaintiff in Error.

vs.

FRANCISCO GOMEZ,
Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Arizona.

BRIEF OF PLAINTIFF IN ERROR

ANDERSON, GALE AND MILLER
Attorneys for Plaintiff in Error

Filed this.....day of.....,1925

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United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHWEST METALS COMPANY, A Corporation, Plaintiff in Error, vs. FRANCISCO GOMEZ, Defendant in Error.	No.....

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

Defendant in Error, Francisco Gomez, Plaintiff below and herein referred to as Plaintiff, brought suit against the Plaintiff in Error, Southwest Metals Company, a Corporation, Defendant below and herein referred to as Defendant, in the District Court of the United States for the District of Arizona, for an alleged injury to his left eye. Said action was a statutory one under the Arizona Employers' Liability Law, claiming damages in the sum of Ten Thousand Dollars. Gomez was employed by the Metals Company as a manual laborer, and claimed that he was injured by an

accident arising out of and in the course of his labor, and due to a condition of such occupation or employment. He alleged, (See Par. 3 of said Amended Complaint, Transcript of Record, Page 11 and 12):

> "That plaintiff sustained injuries in substantially the manner following:
>
> "The plaintiff on said date, was employed and at work, as a miner, in one of said defendant's mines, known as the Blue Bell mine, and on the 1200 ft. level thereof, in stope No. 40, and in the usual course of his employment was picking rock with a bar, when a small piece of rock, dust or debris dropped from the roof of said stope, striking the plaintiff in the left eye, injuring said left eye; *that as a result of said injury to said eye, and without fault on the part of this plaintiff, the said eye became infected, and the plaintiff's vision in his said left eye was permanently and totally destroyed;* that by reason thereof, the plaintiff has suffered great physical pain and has been disabled from following his usual occupation of a miner and manual laborer; all to his damage in the sum of Ten Thousand ($10,000.00) dollars;"

Plaintiff claimed that he was injured while working for the Metals Company; that he got a piece of rock in his eye; that his vision is ruined; that before this time he had perfect eye.

The defendant denied this and attempted to show that he was injured in his eye at a former time, and

attempted to show by the doctor who treated him at the former time, what the injury was, and attempted to show by the doctor that he had formerly operated on this eye.

Defendant also attempted to impeach the statements of Plaintiff that the doctor took some dirt out of his eye at the time of the alleged injury, by the doctor who plaintiff claimed performed this service. This the Court excluded as privileged.

Under the Arizona law, (Ariz. Session Laws, 1921, Chapter 131, which reads as follows:

> "Sec. 1. On or before the trial of any action brought to recover damages for injury to the person, the court before whom such action is pending may, from time to time, on application of any party therein, order and direct an examination of the person injured, as to the injury complained of, by a competent and disinterested physician or physicians, surgeon, or surgeons, in order to qualify the person or persons making such examination, to testify in said cause as to the nature, extent, and probable duration of the injury complained of; and the court may in such order direct and determine the time and place of such examination; provided, this act shall not be construed to prevent any other person or physician from being called and examined as a witness."

At defendant's request Doctor Buck was appointed under this statute to examine the Plaintiff for the pur-

pose of testifying at the trial. The doctor testified as to the condition that he found in the eye, the cause of that condition. (See Transcript of Record, Pages 46-51.)

A nurse who was working for the Southwest Metals Company in its hospital under the supervision of their doctor was tendered by the Defendant. This nurse treated the plaintiff when he came to the hospital. Her testimony was excluded as within the Arizona statute of privileged communications, Civil Code 1913, Par. 1677, (6), which reads as follows:

> "*A Physician or Surgeon* cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient; provided, that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney."

Defendant offered to prove by the nurse what treatment was given to the Plaintiff, and her observations of the eye, and what she knew independent of the physician by reason of her observations in the capacity of nurse. This the Court refused, and an exception was taken. (See Transcript of Record, Page 53.)

Plaintiff placed on the stand a doctor who had previously examined the Plaintiff and he described the

Plaintiff's injury. The doctor was then asked concerning occupational or industrial blindness, over the objection of the Defendant, because there was nothing in the pleadings, and no issue as to any industrial blindness, and no such terms are known to the Arizona law. (See Transcript of Record, Page 55.) The Court permitted the witness to so testify and to state that the Plaintiff was occupationally blind in his eye. Defendant undertook to show, on cross examination, that this doctor made a habit of appearing for plaintiffs in personal injury cases, in order to show his interest and bias. Plaintiff objected, and the Court sustained the objection, and an exception was taken by the Defendant.

The defendant moved for a directed verdict at the close of the Plaintiff's evidence and renewed this motion at the close of all the evidence. (See Transcript of Record, Pages 18-19; also pages 34 and 35; page 59; page 79.)

The Defendant offered Doctor Vivian to prove operation on Plaintiff's eye at a previous time, and to show condition of the same, in impeachment of the Plaintiff's statement that the eye was perfectly recovered from the said operation. This was refused on the ground of privilege. (See Transcript of Record Page 46; also Page 60.)

A witness, expert on Wassermann Tests, was introduced by the Defendant, who had made two tests of Plaintiff's blood, and the result showed very positive

syphilitic condition. (See Transcript of Record, Pages 60-63.)

Defendant also introduced evidence to show that plaintiff did not report any injury to his eye and that he delayed making such report; that infection was more liable by reason of the delay.

Defendant's theory of the case, based on the testimony of Doctor Buck and the Wassermann examination of the Plaintiff, was that there was no injury whatever to the eye; that its condition was the result of Interstitial Ceratitis, and that it was produced by the syphilis in the blood of the Plaintiff. The defendant tendered the testimony of Doctor Vivian and Doctor Gatterdam, and asked them for an expert opinion based upon the facts of Defendant's case assuming the testimony which they had heard in full, to be true. This the Court refused to allow, and exception was saved. (See Transcript of Record, Pages 73, 74, 75, testimony of Dr. Vivian and Dr. Gatterdam.)

The Plaintiff was then permitted on rebuttal to place Doctor Bakes on the stand and give evidence that there was no relation between a syphilitic condition and the condition of Plaintiff's eye. The jury returned a verdict of One Thousand Dollars.

The following Assignments of Error are relied upon:

ASSIGNMENT OF ERROR NO. 1

The United States District Court for the

District of Arizona erred in overruling defendant's demurrer to the Complaint.

ASSIGNMENT OF ERROR NO. II

The United States District Court for the District of Arizona erred in overruling the defendant's objection to the introduction of any evidence, made at the beginning of the trial.

ASSIGNMENT OF ERROR NO. III

The United States District Court for the District of Arizona erred in sustaining the objection of the Plaintiff to the following questions, thereby excluding evidence offered by the Defendant during the examination of Dr. Robert T. Frankklin, on the ground that such evidence was privileged:

Q. You heard his testimony here while he was on the stand, stating that he came to the hospital where you were?

A. Yes, sir.

Q. And you heard him state that you took some dirt out of his eye?

Q. Now, I ask you Doctor, did you or did you not remove any dirt from his eye on that occasion?

for the reason that said evidence was offered solely for the purpose of contradicting the testimony of the plaintiff that the doctor had removed dirt from his eye.

ASSIGNMENT OF ERROR NO. IV

The United States District Court for the District of Arizona erred in sustaining the

objection of the plaintiff to the following question, thereby excluding evidence offered by the defendant during the examination of Dr. Charles S. Vivian, on the ground that such evidence was privileged:

Q. Did you treat both of his eyes at that time?

for the reason that said testimony was offered by the defendant solely for the purpose of contradicting a statement made by the plaintiff in his testimony that the doctor had treated both of his eyes.

ASSIGNMENT OF ERROR NO. V

The United States District Court for the District of Arizona erred in sustaining the objection to the testimony of Tessie M. Benedict, a nurse, on the ground that her testimony was privileged under Section 1677, sub-section 6, of the Revised Statutes of Arizona, Civil Code, 1913, for the reason that she was not a physician or surgeon and, therefore, her testimony was not privileged.

ASSIGNMENT OF ERROR NO VI

The United States District Court for the District of Arizona erred in sustaining the objection of the plaintiff to the following question, thereby excluding evidence offered by the defendant during examination of Dr. Robert C. Buck, on the ground that such evidence was irrelevant and immaterial:

Q. Were you appointed under the order of the Court to examine this man?

for the reason that said evidence was offered for the purpose of showing that the witness was an impartial and unbiased witness.

ASSIGNMENT OF ERROR NO. VII

The United States District Court for the District of Arizona erred in sustaining the objection of the plaintiff to the following question on cross examination, thereby excluding evidence sought to be brought out by the defendant during the cross examination of Dr. Edwin C. Bakes, on the ground that it was immaterial:

Q. You make it a habit of appearing for plaintiff in these personal injury cases?

for the reason that the question was propounded to show the interest, bias and prejudice of the witness.

ASSIGNMENT OF ERROR NO VIII

The United States District Court for the District of Arizona erred in admitting, over the objection of the defendant, the following testimony by Dr. Edwin C. Bakes:

Q. Do you know what the term occupation or industrial blindness is?

A. Yes, sir?

Q. What is the term?

A. It is considered that vision less than 20/70 constitutes occupational blindness. This is a condition in which the individual who has a total blindness of 20/70 is incapacitated in a great many ways, as far as work is concerned, that is, doing accurate work—

that is, if the person has only 20/70 vision. In both eyes he would be occupationally blind. The plaintiff is occupationally blind in his left eye.

for the reason that industrial blindness was not an issue in the case and there was nothing in the pleadings concerning it.

ASSIGNMENT OF ERROR NO. IX

The United States District Court for the District of Arizona erred in sustaining the objection of the plaintiff to the following question, thereby excluding testimony offered by the defendant during the examination of Dr. Charles W. Vivian:

Q. Now, assuming the facts stated by the doctor and Mr. Culp in their testimony to be true, can you, basing your evidence upon that assumption of those facts only, give your opinion as to what is the condition present in his eye?

A. Yes, sir.

for the reason that this question was propounded to the physician as a hypothetical question based on medical testimony adduced on behalf of the defendant only, all of which the witness had heard in the court room, was, therefore, the same as though all of the evidence which the witness had heard in the court room had been repeated to him in the question.

ASSIGNMENT OF ERROR NO. X

The United States District Court for the

District of Arizona erred in excluding the following testimony offered by the defendant during the examination of Dr. E. A. Gatterdam:

Q. What in your opinion, assuming the facts as stated by Dr. Buck to be true and the facts as stated by Mr. Culp to be true, what is the condition—the cause of the condition that exists in his eye?

for the reason that this question was propounded to the physician as a hypothetical question based on medical testimony adduced on behalf of the defendant only, all of which the witness had heard in the court room and was, therefore, the same as though all of the evidence which the witness had heard in the court room had been repeated to him in the question.

ASSIGNMENT OF ERROR NO. XI

The United States District Court for the District of Arizona erred in denying and overruling defendant's motion for a direct verdict at the close of all of the evidence.

ASSIGNMENT OF ERROR NO. XII

The verdict of the jury is contrary to law.

ASSIGNMENT OF ERROR NO. XIII

The verdict is not supported by and is contrary to the evidence.

ASSIGNMENT OF ERROR NO. XIV

The United States District Court for the District of Arizona erred in entering judgment upon the verdict and said judgment is contrary to law.

ASSIGNMENT OF ERROR NO. XV

The United States District Court for the District of Arizona erred in entering judgment upon the verdict and said judgment is not supported by and is contrary to the evidence.

ASSIGNMENT OF ERROR NO. XVI

The United States District Court for the District of Arizona, erred in refusing to grant the defendant a new trial.

POINTS AND AUTHORITIES

(ASSIGNMENTS OF ERROR I, II, AND XI)

The Court erred in not granting Defendant's demurrer to the Complaint and in not sustaining Defendant's objection to the introduction of any evidence made at the first offer of any testimony. This embraces the first two Assignments of Error, and both will be treated together.

The Statute of Arizona, Paragraph 3158 Civil Code, also Paragraph 3154, Civil Code, provides liability without fault against employers of labor for certain hazardous occupations, and limits that liability to death or injury caused by any accident due to a condition of such occupation, with a proviso that the employer shall not be liable if the injury or death is caused by the negligence of the employee killed or injured. This Complaint charges that an accident caused a piece of rock to strike the Plaintiff in the left eye, thereby injuring said eye. It further charges,

> "that as a result of said injury to said eye and without fault on the part of this Plaintiff, the said eye became infected, and Plaintiff's vision in said left eye was permanently and totally destroyed."

First, there is no charge that the injury to the eye caused by the accident destroyed the vision in said eye, and (second), there is the positive allegation that the infection did cause the loss of the vision. The infection was charged to have resulted from the injury, but there is no allegation that the accident caused the infection; there is no allegation as to how the infection was caused, where it came from, whose fault it was, or anything of a positive nature except that it was without fault of the plaintiff. This, we contend, does not state a case within this law because there is no allegation that the accident caused the infection to the eye of which they complain. There is no allegation and there was no proof even tending to show that the infection resulted from the inherent risks or hazards of the occupation. There was no allegation and no evidence tending to prove that the accident in any way caused the infection. There was no allegation and no proof showing how the eye became infected,—simply a bare allegation that as a result of said injury the eye became infected. This being a statutory action, a liability against us without our fault, it must be reasonably construed and the allegations must be brought within the reasonable terms of the statute. If speculation is allowed, we can say that as a result of the in-

jury infection ensued; that as a result of the infection, it was transmitted to his family; that as a result of transmitting it to his family it was transmitted to the children, and on, and on, building one result upon another. We are liable under the statute for the *injury* caused by an accident due to a condition of his employment; the accident must be due to the inherent conditions of his occupation. The accident, if caused by other and outside conditions, does not make us liable. An accident, we repeat, must be due to the inherent conditions of the occupation, and said accident must have caused the injury complained of. Nothing more than this was contemplated in the statute. Occupational diseases, sanitary conditions, are not contemplated or taken into consideration in the law. The law does not provide a remedy for ordinary sickness or infections contracted while at work, or for any disease contracted while in our employ. The statute plainly limits liability to injury caused by accident due to a condition of the occupation. This question is very important to Defendant and others engaged in the hazardous occupation of mining within the State of Arizona. What is embraced within this Arizona Act, and to what things the accident is due, (inherent risks and hazards), and for what the employer is liable had been carefully laid down by the Supreme Court of the United States in the case of:

Arizona Copper Co. vs. Hammer
63 Law Ed. 1058.

and in passing, we want to say that the Supreme Court has held that said accident and injury must be based upon and due to the inherent conditions of the occupation.

This question is dependent upon the construction of the Arizona statute. Other states have other statutes, and the statute itself must be looked to carefully. We have some cases which we feel are of great persuasive weight to this Court, although deciding questions based upon other statutes. This question has not been determined by our own Supreme Court. We call particular attention to the following cases:

Pacific Coast Casualty Co. vs. Pillsbury
153 Pac. p. 24 (Calif)

Ruth vs. Witherspoon Engr. Co.
157 Pac. 403 (Kansas)

We want the Court to keep in mind the language of our statute. It says:

"Injury caused by any accident due to a condition or conditions of such occupation."

There is no language of "proximately caused", no language of "resulting from", no limitation, no enlargement; the injury complained of must have been caused by the accident, and the accident must be due to the condition of the occupation.

See:

Kill vs. Industrial Comm. of Wisconsin
152 N. W. 148 (Wis.)

Selleck vs. Janesville
55 N. W. 696 (Wis.)
20 L. R. A. 541

Selleck vs. Janespille
75 N. W. 975 (Wis.)
41 L. R. A. 563

Lesh vs. Illinois Steel Co.
157 N. W. 539 (Wis.)

There was no allegation and no evidence showing that the inherent risks and hazards of the occupation caused the *infection*. There is no allegation and no proof, or anything tending to prove, that the *injury* caused the loss of the eye. Everywhere, both in allegation and proof, what little there is, goes not to the *injury* but to the *infection*. Nowhere in either proof, or the allegations, are we held liable for the *injury*,—everywhere for the *infection*. There is no allegation, no proof that a poisonous substance got in the eye, while working; no allegation that the piece of rock was infected; no allegation that he was handling infected materials, or poisonous materials.

All the evidence in the case shows that the infection was from syphillis. There is no evidence to show that the infection occured without the fault of the plaintiff. This question was raised also in our Motion for a Directed Verdict at the close of the Plaintiff's case, and again at the close of all of the evidence, and it was raised in our Motion for a New Trial, upon the ground that the verdict and judgment is contrary to

the law. The evidence shows that this slight injury to the eye, without the infection, would have caused practically no permanent results and would not have interfered with the vision. The infection itself, or a former injury, was the real cause of the permanent condition of the eye. No evidence to show that the infection was the result of the injury, as alleged; no evidence to show that it was caused by the accident; no evidence to show that it was due to a condition of the employment. Our position is that this Complaint does not state a cause of action under our Employer's Liability Law, and also that the Court erred in not directing a verdict because the burden of showing that the plaintiff had complied with the law and made out a case according to the evidence, was not carried by the plaintiff. A very enlightening case upon this whole question is the case of:

McCoy vs. Michigan Screw Co.,
147 N. W. 572 (Mich.)

and also reported in:

Vol. 5 Negligence Cases p. 455

This case is especially called to the attention of this Court.

See also:

Guthrie vs. Detroit Shipbuilding Co.
167 N. W. 37

In re Knight
120 N. E. 395

A case, almost parallel to the present one is the case of:

Doolan vs. Henry Hope & Sons
(1918) W. C. & Ins. Rep. 121
119 L. T. R. 14

See also:

Miller vs. Jenson & Nicholson
(1918) W. C. & Ins. Rep. 51

Grant vs. G. & G. Kynoch
(1918) W. C. & Ins. Rep. 117

Perry vs. Woodward Bowling Alley
163 N. W. 52

We respectfully submit that said Demurrer should have been sustained; that the objection to the introduction of evidence should have been sustained. We fully urged all of these objections, both on Demurrer, and upon our objection to the introduction of evidence to the Trial Court. (See Transcript of Record, page 15; also pages 34-35), and the Motion for a Directed Verdict, at the close of Plaintiff's case, and certainly at the close of all of the evidence, should have been sustained, for the foregoing reasons.

(ASSIGNMENTS OF ERROR NO. III AND IV)

Assignments of Error Number III and IV raise the same question of law, that is that the physician's evidence is not privileged to contradict a sworn statement of the patient, the plaintiff. The plaintiff had stated, in the one instance, that the doctor took some dirt out of his eye. (2nd) The patient, and plaintiff, stated that on a former occasion a certain doctor had treated both of his eyes. The doctor was asked in the one instance, the direct question: "Did he remove any dirt

from his eye?" And in the other: Did he treat both of his eyes at that time?" There was no question as to what treatment he did give. There was no question asked as to what condition he found the eye in, or what he discovered. It was solely for the purpose of impeachment. The privilege does not extend to such a question::

40 Cyc. 2040
Note 88

and is not embraced within our statute, (Section 6, Paragraph 1677, Civil Code of Arizona), and is not within this statute, as construed by the Supreme Court of Arizona.

Arizona Copper Co. vs. Burciaga
20 Ariz. 85

Railroad vs. Clark
235 U. S. 669

It is a quite familiar rule that where the patient voluntarily goes into detail, regarding the nature of his injuries, testifying as to what the physician did, or said, while in attendance, that the privilege is waived, and the adverse party may examine the physician.

28 Ruling Case Law p. 134
Note 6

National Association vs. McCall
48 L. R. A. (N. S.) 418

Epstein vs. Pennsylvania Ry., Co.
156 S. W. 699

Annotated Cases 1915 (a)
423

48 L. R. A. (N. S.) 394
and note

The privilege extends only to matters which are in their nature, confidential, and does not prevent a physician from testifying as to matters, the disclosure of which involves no breach of professional ethics.

40 Cyc. 2384
and cases cited under
Note 45

We are not unmindful of the decision in the Phelps-Dodge Corporation vs. Gurrero case, 273 Fed. 415, but we think there is a plain distinction between the questions involved therein and the ruling here complained of.

Our point is that the statement of the treatment given is neither a communication, nor knowledge, obtained by personal examination of such patient. That is all our statute prohibits, and certainly even under the Gurrero and Clark decisions, the defendant should be entitled to contradict statements of the plaintiff as to what the physician did, without disclosing any communication or conveying any knowledge obtained by personal examination of the patient.

See:

Moreno vs. New Gualalupa Min. Co.
170 Pac. 1088

(See bottom of page 1091, 2nd col. and 1st col. on page 1092, where Wigmore on Evidence on this question is quoted with approval).

(ASSIGNMENT OF ERROR NO. V)

Assignment No. V raises the question of whether a Nurse is within the rule and the statute of Arizona, as to privileged communications. We take the position that she is not a physician or surgeon, and not within the prohibition of the statute. There is no rule at Common Law, which prohibits a Surgeon or Physician, or a Nurse, from testifying. Our Statute being in derrogation of the Common Law, and while liberally construed, it cannot be extended beyond the plain terms of the Statute. Its plain terms provide:

Paragraph 1677 (Sec. 6) Civil Code of Arizona:

> "*A Physician or Surgeon* cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient; provided, that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney."

The law applies, strictly, to physician or surgeon, and not to an outsider, or to a Nurse, or to a by-stander.

This Nurse had valuable testimony to give. She saw the eye. She knew its condition. She knew its condition as to former injury. The importance of such testimony to be given by her could not be ques-

tioned. The question is: Does she come within the Statute of Arizona?

This whole question is embraced in the law as laid down in:

40 Cyc. (Sec. 5)
page 2381
28 Ruling Case Law
par. 121

At Common Law there was no privilege as to communications between physician and patient, and the rule still prevails where there is no statute, as laid down by the above citations. It is therefore a question of what the Statute provides.

In order for a physician to be incompetent, the relation of physician and patient must have existed between him and the person in question:

40 Cyc. page 2382
Sub-head (B) Par. 5

The rule against disclosure applies only to those who are engaged as general practitioners of medicine and surgery, and whose business as a whole comes within the definition of "physician" or "surgeon."

40 Cyc. page 2383
Note 38

Citing:

People vs. DeFrance
62 N. W. 709
28 L. A. R. 139

Brown vs. Hannibal
66 Mo. 588

Duetschmann vs. Third Ave. Railway
84 N. Y. S. 887

Hendershot vs. Western Union Tl.
76 N. W. 828

Vol. 28 Ruling Case Law
Par. 128

General subject "Witnesses" Sub-head: "Who are witnesses within meaning of statute."

Some cases have gone so far as to hold that a physician, to be disqualified, must be one duly authorized to practice his profession, under the laws of the State in which his testimony is offered, and that it does not apply to persons not so authorized, even though they are engaged in the practice as physicians elsewhere.

Headcann vs. Locher
68 Pac. 136

Colorado Springs Co. vs. Fogelson
94 Pac. 356

Wm. Laurie Co. vs. McCullough
90 N. E. 1014

40 Cyc. 2383
Note 39

See also:

Annotated Cases 1913 (A)
Page 49

Even where the prohibtion is made to apply generally to physicians, the word is construed to include those, only, who are lawfully engaged in the practice of medicine, and therefore duly authorized to pursue that vocation.

28 Ruling Case Law
Sec. 128

A dentist is not a physician, or surgeon, within the statutes relating to privileged communications.

People vs. DeFrance
28 L. R. A. (N. S.) 139
cited above.

nor is a druggist or drug clerk:

28 Ruling Case Law
Sec. 128. Note 20

nor is a Veterinarian Surgeon:

Hendershot case cited above.

The relation of physician and patient must exist before the statute applies.

28 Ruling Case Law
Par. 129

Where a conversation between a physician and patient takes place in the presence and hearing of a third person, such third person may testify as to what was said.

40 Cyc. 2388
Note 79

Springer vs. Byram
36 N. E. 361

Indiana Traction Co. vs. Thomas
88 N. E. 356

Mason's Union Life vs. Brockman
59 N. E. 401

Wells vs. New England Rd.
40 Atl. 802

Some Courts have gone to the extent of holding that even a physician may testify as to what was said in a conversation between himself, the patient, and a third person.

State vs. Werner
112 N. W. 60

There are some States that have extended the Statute to nurses, and under such statutes, of course, the nurse cannot testify, but we have no such statute in Arizona.

The case of:

Homnyack vs. Prudential Life Ins.
87 N. E. 769

is interesting because it passes upon a statute which expressly includes professional and registered nurses, showing clearly that if the Legislature of Arizona had intended to include nurses within the prohibition of the statute they would have expressly so provided.

In this connection we want to call the Court's attention to Section 4 (of the same Chapter and of this same statute they would have expressly so provided.
Legislature, at the same time that Paragraph 6 was enacted.) of Paragraph 1677 of the Revised Statutes of Arizona, on Privilege, which provides:

> "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; *nor can an Attorney's sec-*

retary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity."

It will be noted that the Attorney's Secretary, Clerk and Stenographer, is expressly included in the statute. If it was intended by the Legislature to include nurses within the statute, or hospital attendants, or any other persons, save and except the physician or surgeon himself, it could have easily been definitely stated in the statute. If nurses are to be included within this statute, the statute must be amended. The statute, being contrary to the Common Law, it cannot be enlarged by intendment.

See:

Laurie vs. McCullough
90 N. E. 1014
Syllabus No. 13

where they hold that this statute, being in derogation of the Common Law, cannot be enlarged by intendment. A very interesting case upon this question is the case of.

Howe vs. Reagenburg
132 N. Y. S. 837

This case is interesting because it defines who are physicians within such a statute, and it is further interesting because it permits the secretary of the prohibited person to testify.

If our Legislature had so intended they could have easily inserted the word "nurse" in our statute.

Our Supreme Court, in the case of *Flowing Wells vs. Culin*, 11 *Ariz.* 425, *reading from page* 429, says:

> "We recognize that it is the duty of all Courts to confine themselves to the words of the legislature, nothing adding thereto; nothing demitting. The Court has no authority to extend the law beyond the fair and reasonable meaning of its terms, because of some supposed policy of the law."

And, if the Legislature had intended to include nurses, within this statute, it would have used apt words to have included them.

State of Arizona vs. Inspiration Copp. Co.
20 Ariz. 503

reading from top of page 512.

Roberts vs. City of Ottawa
165 Pac. 869
last par. col. 1, page 870

Donohue vs. City of Newberry Port
98 N. E. 1081

reading from middle of first column, on page 1083:

> "When the legislature has intended to include both municipal and business corporations, within the scope of a statute, generally, it has used plain words to that effect."

(ASSIGNMENTS OF ERROR NO. VI AND VII)

The Court erred in sustaining the objection of the plaintiff to our offer to prove that Doctor Buck was appointed under the Arizona Statute, Session Laws 1923,

Chap. 30, page 102, quoted above in this Brief, which permits said action, and we had the right to show that this doctor was so appointed and that he was impartial and unbiased and not in our employ, or directly opposed to the Plaintiff. Under the familiar rule of evidence, that the interest or lack of interest, or the bias or prejudice of the witness may be shown, we feel that the Trial Court erred.

To the same effect is Assignment No. VII, only the converse of the proposition exists, as we undertook to prove that Doctor Bakes was biased and prejudiced in favor of the Plaintiff because he was in the habit of appearing in behalf of the plaintiff in personal injury cases. The Court erred in refusing to permit us to show that bias and prejudice of Doctor Bakes, and erred in refusing to permit us to show that Doctor Buck was a competent and disinterested physician and that he was appointed under the order of the Court to examine the Plaintiff. This error was made more glaring by the giving of certain instructions to the jury. (See Instructions of the Court on the questions of certain Physicians being appointed. See also Transcript of Record, page 56.)

See:

Jones on Evidence, 3rd Ed.
Sees. 826, 828 and 902

(ASSIGNMENT OF ERROR NO. VIII)

The Court erred in permitting the Plaintiff to offer the testimony of Doctor Bakes over our objection as to

the term, "occupational or industrial blindness." There is no issue of industrial blindness in the case. There is no such provision of the statute of Arizona. There is no law of Arizona relative to occupational disease or industrial qualifications or disqualifications. The doctor stated over our objections that the Plaintiff was occupationally blind in his left eye. The Complaint charged total and permament disability. Our authorities in support of this position are the pleadings and the issue tendered thereby, the section of the Arizona Statute quoted above which gives a right of action upon which this cause is founded, to-wit: Sec. 3154 and 3158 Civil Code of Arizona.

(ASSIGNMENTS OF ERROR NO. IX AND X)

Assignments No. IX and X are the same. The only difference is the difference in the witness tendered by the defendant. One was Doctor Vivian, and the other Doctor Gatterdam. The Defendant had offered testimony of Doctor Buck and Mr. Culp as to the present condition and the cause of that condition of the Plaintiff's left eye. This testimony showed, (1st) that there was no outside injury to the eye, such as a cut, that would be caused by a rock or a piece of steel; (2nd) that the injury to the eye was internal and occasioned by disease. Doctor Vivian and Doctor Gatterdam had been present in the court room and heard all of the testimony offered by the defense upon their theory of the case. After all of this testimony was before the jury the Defendant tendered the testimony

of these two doctors, (qualified them as to their education, qualified them as to having heard all of this testimony and then further qualified the questions by assuming the facts stated by Doctor Buck and Mr. Culp, ((all of the witnesses who had testified for the defense on this theory of the case.)) were true, and asked them, what, in their opinion was the cause of and the condition present in the Plaintiff's eye, expecting to prove by said expert evidence that it was internal and caused by a blood condition, and not by external injury. The Court erred in refusing to permit such a hypothetical question. The province of the jury was not invaded by the question; the expert was not called upon to pass upon the evidence for the Plaintiff and weigh it against the evidence of the Defendant; all they were asked to do was to base their opinion upon all of the evidence for the Defendant. Such evidence is admissible as a hypothetical question. The trial Court was apparently confused with the rule that:

> "An expert generally cannot be allowed to base his opinion on the evidence he has heard given in the case."

That is the general rule, but, he can give his opinion based upon all of the evidence of either side of the controversy. This whole question and the law upon the proposition is laid down in:

Vol. 11 Ruling Case Law
"Expert and Opinion Evidence"
Section 12

and we call the Court's attention, particularly, to the following:

> "After the whole of the testimony delivered by one of the parties or by certain of the witnesses for one party is made known to the expert either by his reading it or hearing it, and he is then asked his opinion upon it, assuming it to be true, in either case the opinion is sought upon an assumed state of facts and may therefore be given."

See also:

Yardley vs. Cuthbertson
1 Atl. 765 (Pa)

Kliegen vs. Aitken
69 N. W. 67 (Wis.)
35 L. R. A. 249

City of Chicago vs. Didier
81 N. E. 689 (Ill.)

Assets Realization Co. vs. Wellington
194 Fed. 87

Vol. 17 Cyc. page 253, par. 4
"Evidence"
and cases cited thereunder.

See also:

Expansion Gold Min. Co. vs. Campbell
163 Pac. 968 (Colo.)

Howland vs. Oakland Cons. St. Ry. Co.
42 Pac. 983 (Cal.)

The case of Dexter vs. Hall, 21 L. Ed. page 73, is one of the leading cases upon this question, and the

decision written a good many years ago. We call the Court's particular attention to the fourth from the last paragraph in this decision and ask the Court to note that the witness was however, "allowed to give his opinion upon the testimony adduced by the plaintiff's" but they held that the witness could not give his opinion upon all of the facts, as this would be passing upon the questions for the jury, but they recognize the rule and distinction which we are maintaining, that the expert witness may give his opinion upon the evidence for one side or the other, of the case. The Court's refusal to permit this testimony was particularly harmful to us in view of the fact that we were foreclosed in having any medical testimony except Doctor Buck's and in further view of the fact that the Plaintiff was permitted in rebuttal to establish by the testimony of Doctor Bakes, (See Transcript of Record, Pages 78 and 79, " that there was no connection between the injury and the syyhilitic condition of the patient."

(ASSIGNMENTS OF ERROR NO. XI, XII, XIII, XIV, XV AND XVI)

The other Assignments of Error, No. XI, XII, XIII, XIV, XV, and XVI, are embraced in the foregoing except that "the verdict was not supported by the evidence," and that "the verdict was contrary to law," and that "the Trial Court erred in refusing to grant Defendant a new trial." The evidence was insufficient to support a verdict for One Thousand Dollars. The evidence tended to prove either of the following:

(1st) That the Plaintiff was not entitled to recover any damage, or

(2nd) If entitled to recover anything he was entitled to recover more than One Thousand Dollars.

The loss of the eye,, if Defendant was responsible could not be compensated for in the sum of One Thousand Dollars. On the other hand, if Defendant was not responsible, the One Thousand Dollars was a gratuity and not based on any evidence in the case. The jury apparently compromised and gave a judgment not based upon the evidence. If they believed Plaintiff 's evidence and believed that he was totally blind, or, if you please, if they believed he was occupationally blind, he was entitled to more than One Thousand Dollars. On the other hand, if they believed that he was not injured at all while in the employ of Defendant, then they should have returned a verdict for the the Defendant. Juries have no right to return verdicts not based upon evidence. See:

Southwestern Ariz. Fruit & Irrig. Co. vs. Cameron
141 Pac. 572 (Ariz.)
Thompson on Trials, Sec. 2606,

as follows:

"Where the verdict which the jury returns cannot be justified upon any hypothesis presented by the evidence, it ought to be set aside. Thus, if a suit were brought upon a promissory note, which purported to be given for $100.00, and the only defense was that the defendant did not execute the note, and the

> jury should return a verdict for $50.00 only, it would not be allowed to stand; for it would neither conform to the plaintiff's evidence, nor to that of the defendant. It would be a verdict without evidence to support it; and it is not to be tolerated that the jury should assume, in disregard of the law and evidence, to arbitrate differences of parties, or to decide according to some supposed natural equity, which in reality is merely their own whim."

The evidence is also fatally defective because there is no evidence of any kind to show that the infection was the result of the injury. We recognize the rule that if there was any evidence it should go to the judges of disputed facts, but where, as in this case, there is no evidence showing that the infection was caused by the injury, then there is a complete failure of proof, and it requires no citation of authorities to this Court to establish the law upon that proposition. Again, there is a fatal lack of evidence to show that the infection resulting from this injury caused the loss of the sight of the eye. There is no evidence tending to show that said infection caused the loss; all is guess, conjecture, supposition. No authorities are required upon that proposition as it is too well established as a rule of law.

See:

Ash vs. Childs Din. Hall Co.
120 N. E. 396

In conclusion we wish to emphasize Assignment No. XI, and Assignment No. XIII.

There is no evidence in this case tending to support the allegations of the Complaint. There is no evidence of any sort, or kind, in this record showing that there was any infection of this eye, other than the Syphilitic infection. There was no evidence that the injury, caused by the accident, impaired the vision of the eye. There is nothing in this record to show that any infection of the eye caused its present condition, except the Syphilitic infection, brought out in the evidence of the defendant.

We challenge Counsel to point in the record to one line of testimony showing what caused this permanent condition of this eye, save any except the Syphilitic infection or the former injury. There is nothing in the evidence of the Plaintiff. There is nothing in the evidence of any of the witnesses for the Plaintiff. The evidence of Dr. Bakes, for the Plaintiff, shows there was an injury, or an ulcer, but when and where, or how it came, or what connection it has with this case, the record is silent.

The Court should have, under the old familiar rule, Ash vs. Childs, 120 N. E. 326, cited above, directed a verdict.

Western Union Tel. Co. vs. Totten
72 C. C. A. 591
141 Fed. 533

There is nothing but guess, nothing but conjecture, no evidence of any kind or character.

We have tried to fairly cite to the Court every page of the Transcript of Record, as to the entire evidence bearing upon these questions. We have inserted them at the particular place in our Brief, but for fear something has been overlooked, and in view of the fact that the record is very short, we especially call the Court's attention to the following pages of the Transcript of Record, as bearing upon the questions here involved, to-wit:

Pages 12-14; page 15; pages 18-19; pages 27-32, inclusive; pages 34-35; pages 38, 39, 40, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 59, 60, 61, 62, 63, 73, 74, 75, 76, 77, 78 and 79.

There are several very pronounced and important questions raised on this Writ of Error. They are:

(First) The construction of the Employers' Liability Law of Arizona, as to whether a cause of action is stated in the Complaint, based thereupon. This we raised by Demurrer and by the objection to the introduction of any evidence;

(Second) The refusal of the Court to grant a Directed Verdict, upon our Motion at the close of Plaintiff's case, and again at the close of all of the evidence;

(Third) The absolute failure of proof to support the allegations of the Complaint, either as to the injury, or as to the infection resulting from the injury;

(Fourth) The right of a Nurse to testify in this

case. Our contention is that she is not within the "Privileged" Statute of Arizona, relative to physicians and surgeons, and being permitted, under all the rules of evidence, to testify, unless prohibited by said Statute, the Court erred in holding that she came within said Statute.

(Fifth) The right of expert witnesses to testify to a hypothetical question, based upon all of the evidence which they had personally heard in the court room, introduced on behalf of the Defendant.

(Sixth) The right of physicians to contradict, or impeach a patient, said contradiction involving no question of communication, or disclosure of knowledge obtained by the physician. (For instance, suppose the patient testifies that Doctor Brown, his physician removed his right eye, on a certain day, in a certain operation. Certainly, Doctor Brown could be asked to deny that fact and state that he did not remove such eye. He would be precluded, probably, from telling what he did do, or what he observed, but he certainly could be permitted to directly contradict such a positive statement).

The other questions raised here are by no means waived by this recapitulation of the points relied upon by us, because they are very important when taken in connection with those named above, all bearing toward the same end,—that is to say that the defendant did not have a fair and impartial trial, upon the issues

here in and upon the law of Arizona relating thereto, and upon which Plaintiff's action is based.

Respectfully submitted,

ANDERSON, GALE AND MILLER,

Attorneys for Plaintiff in Error.